

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: August 24, 2007

TO : Alan Reichard, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: IATSE Local 16
Case 32-CB-6183

536-2545-2900
536-2581-3314
548-2067

This case was submitted for advice as to whether the Union operated an exclusive hiring hall, and thus breached its duty of fair representation by not dispatching the Charging Party to work for an industry employer. We conclude that the parties' practice and the Union's written hiring hall rules reflect a non-exclusive arrangement. Since the evidence is insufficient to establish that the Union operates an exclusive hiring hall with an attendant duty of fair representation, the Region should dismiss the instant Section 8(b)(1)(A) and (2) charge, absent withdrawal.

FACTS

Respondent International Alliance of Theatrical Stage Employees Local 16 services, among others, the motion picture and television industries in the San Francisco area. In April 2005, a production leadman for Union signatory employer Warner Brothers working on a television production called *The Evidence* called the Union to ask for referrals to the set. On April 7, the Union dispatched three individuals for one day to work on the "clean up" crew. Charging Party Victoria Lewis was not one of the individuals dispatched, even though she was on the Union's dispatch list that day. The Union exercises considerable discretion when called on to dispatch employees; neither the Union's records nor the recollections of its officials can establish why the Union dispatched three employees on that date without dispatching Lewis. Lewis alleges in this case that the Union unlawfully failed to dispatch her even though she had put her name on the out-of-work list.¹

¹ Charging Party Lewis has a lengthy history of dissent within this IATSE local. The Region has concluded that the Union did not discriminate against Lewis in making the referral.

The Union's hiring hall is referenced primarily in two documents. The standard collective bargaining agreement with industry employers (including Warner Brothers), referred to as the "Working Agreement," provides that "[i]t is the intent of this section that all technicians be hired through Local 16 to the extent that they are available" The Union also addresses its referral arrangements in a document called "Local 16's Referral List Criteria," which is intended to provide guidance to interested individuals about the referral system's criteria and procedures. The document states, in part:

Local 16 provides a referral system to employees who need individuals in the crafts. Employers from the industry often bring their own crews to work with them on Bay Area productions. Many producers work off of prior employment lists. Local 16 is willing to accommodate any industry employer seeking qualified people by providing them with an out-of-work list for individuals in the desired crafts.

Despite the language of the Working Agreement, and more consistent with the Referral List Criteria the investigation disclosed that many individuals often obtain employment without going through the hall. According to the Union, in most cases, a production company will first hire department heads and key individuals without going through the Union. The leads that have been hired typically have a group of individuals they prefer to work with and will often call them directly. The head of a department will then report to the Union the names of the individuals who they have hired directly in order to pay the contractual benefits on behalf of these individuals. However, if the production company needs the Union's referral services, it calls the Union and either will name request specific individuals or request referrals of individuals in specific skills and crafts. Assistant business agents then select individuals who have put their name on the out-of-work list by dispatching the most qualified individuals on the list who have indicated their availability. On infrequent occasions, an employer may ask the Union for a Skill List, a printed list of individuals with specific skills. It is up to the production company to call whomever it wants off of the Union's Skill List, in whatever order it wants.

Individuals similarly often obtain work by word-of-mouth or through past experiences with employers. Although Charging Party Lewis calls the Union weekly to be put on the out-of-work list, she also seeks employment by directly faxing her resume to production companies or hiring agents in a production's art department. The set decorator for the

Warner Brothers production of *The Evidence* does not put her name on the Union's out-of-work list because she doesn't want to be sent out for convention work or other stage work. Instead, she calls employers directly for film work. The set decorator for *The Evidence* hired three set dressers off the street because she had worked with them in the past and trusted them. One of these set dressers obtains most of his work through word of mouth and personal connections and has only placed himself on the Union's out-of-work-list once during the prior two years. The leadman in charge of hiring the clean up crew for *The Evidence* similarly avoids calling the Union because they might send him people he does not want to work with. Instead, he usually makes his hiring decisions and then calls the Union to tell them their names. A set decorator for a production shooting at about the same time as *The Evidence* usually gets his own jobs; he could not recall the last time the Union obtained work for him.

ACTION

We conclude that the parties' practice and the Union's written hiring hall rules reflect a non-exclusive arrangement. Since the evidence is insufficient to establish that the Union operates an exclusive hiring hall with an attendant duty of fair representation, the Region should dismiss the instant Section 8(b)(1)(A) and (2) charge, absent withdrawal.

An exclusive hiring hall owes users a duty of fair representation in order to ensure that the hall's referrals are governed by objective criteria, free from vague or subjective considerations.² However, no duty of fair representation attaches to a union's operation of a nonexclusive hiring hall.³ Because a finding that a union operates an exclusive hall is often an essential element of a Section 8(b)(1)(A) or (2) violation, the burden of establishing its existence is on the General Counsel.⁴

An exclusive hiring hall is one in which the union is the first and primary, albeit not necessarily the sole, source of employees for an employer. A hiring hall does not

² Carpenters Local 537 (E.I. DuPont), 303 NLRB 419, 420 (1991) (union operating exclusive hiring hall has duty to act fairly and impartially).

³ Teamsters Local 460 (Superior Asphalt), 300 NLRB 441 (1990).

⁴ Carpenters Local 537 (E.I. DuPont), 303 NLRB at 420.

lose its exclusive character merely because, for instance, an employer may directly hire employees whom it had previously employed,⁵ or because a hall may occasionally tell applicants that they can obtain jobs on their own.⁶ However, if a union serves as a source of employment referrals in the absence of an arrangement that meets the criteria of an exclusive hiring hall, the union will be found to be operating a nonexclusive hall. A nonexclusive referral system exists if language relating to referrals is clearly permissive,⁷ or where contractual language is ambiguous and the employers' practice is to regularly hire employees without using the hall and without objection from the union.⁸

We conclude in this case that the Union operated a nonexclusive referral arrangement. First, the two written provisions setting forth the nature of the hiring hall conflict to a large extent and thus do not establish an exclusive system. The Working Agreement describes the intent of the parties that all technicians be hired through the Union. This intent, however, is belied by the Union's published Referral List Criteria, which describes hiring first as a function of employers supplying their own crew, second as employers working off prior employment lists, and only last by the Union providing employers with referrals off its out-of-work list. The document does not describe the Union as the first and primary supplier of labor in the industry, a hallmark of an exclusive hall. Because the two

⁵ See, e.g., Bricklayers, Local No. 8 (California Conference of Mason Contractor Associations), 235 NLRB 1001, 1002-03 (1978) (hiring hall held exclusive; contractual language mandated that employers "shall" notify the Union of need for employees; practice was that employers obtain all employees from hall except for recalled former employees).

⁶ Heavy Construction Laborers Local 663 (Robert A. Treuner Construction), 205 NLRB 455, 456 (1973) (hiring hall held exclusive; five or six times per year, hiring hall allowed members to do own hiring, so long as subsequently cleared by hall).

⁷ See, e.g., Laborers Local 889 (Anthony Ferrante & Son), 251 NLRB 1579, 1581 (1980) (hiring hall mechanism contractually applies only "in the event" employer calls union for referral of an employee).

⁸ Development Consultants, 300 NLRB 479, 480 (1990) (nonexclusive hiring arrangement found; ambiguous contract language coupled with evidence that hiring regularly done outside hall).

written descriptions of the hall's authority conflict, we conclude that together they are ambiguous.

Since contract language fails to clarify the hall's role, the parties' practice demonstrates that the Union's referral system is nonexclusive. The evidence establishes that individuals working in this industry regularly acquire jobs off the street, without going through the hall or even giving it prior notice. The practice apparently is widespread and routine; many employees specifically do not use the hall either because they do not want to be referred to stage or convention work or simply because personal contacts are more important. Furthermore, some hiring agents also shy away from reliance on the hall out of a desire to retain greater flexibility in hiring decisions. The Union apparently is aware of these regular word-of-mouth hiring arrangements and does nothing to put a halt to them.

Accordingly, we conclude that the evidence in its entirety is insufficient to satisfy the General Counsel's burden of establishing that the Union's referral arrangements rise to the level of an exclusive hiring hall. Accordingly, since no duty of fair representation attaches to referrals from this hall, the Region should dismiss the instant Section 8(b)(1)(A) and (2) allegations, absent withdrawal.

B.J.K.